

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 03/08/18; Decision Issued: 03/26/18; Agency: DOC; Carl Wilson Schmidt, Esq.; Case No. 11149; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11149

Hearing Date: March 8, 2018
Decision Issued: March 26, 2018

PROCEDURAL HISTORY

On November 28, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization.

On December 8, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 3, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On March 8, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employed Grievant as a Corrections Lieutenant at one of its Facilities. She had been employed by the Agency for approximately nine years. Grievant was well regarded by Facility managers. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility was divided into two sides. Building AB was on one side and Building CD was on the other side. Grievant worked in Building CD until 2016 or 2017 when the Warden assigned her to work in Building AB. Inmates residing in Building AB could not enter Building CD without a pass issued by security staff. Inmates residing in Building CD could not enter Building AB without a pass issued by security staff.

The agency received allegations from inmates that Grievant was engaged in a nonprofessional relationship with Inmate E. Grievant knew Inmate E was a gang leader. The Agency began an investigation.

Mr. W worked as a Recreational Supervisor at the Facility. He oversaw a basketball league with inmate players and referees at the Facility. Games were played in the gym and the recreation yards for Building AB and Building CD. Mr. W hired several inmates to work in the gym including inmates to serve as referees for basketball games. To select the referees, Mr. W evaluated several inmates including Inmate E. Mr. W decided not to hire Inmate E as a referee.

Mr. W was transitioning from a Recreational Supervisor to a Counselor position in February 2017. Grievant approached Mr. W and offered assistance in coordinating and supervising recreational basketball activities. Mr. W agreed to Grievant's request since he was moving to another position and he assumed Grievant had been authorized to take responsibility for the basketball league.

Inmate E was a "high ranking" gang leader. He was assigned a cell in Building CD. Grievant permitted Inmate E and another offender to leave Building CD and serve as basketball referees for games played in the gym and the Building AB recreation yard. These games were played by inmates assigned to Building AB. By allowing Inmate E to referee games for inmates in Building AB, Grievant enabled Inmate E to communicate with inmates including gang members he would not otherwise have been able to access.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."¹ Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

Group III offenses include, "[f]raternization or non-professional relationships with offenders who are within 180 days of the date following their discharge from DOC custody or termination from supervision, whichever occurs last. Exceptions to this section must be reviewed and approved by the respective Regional Operations Chief or Deputy Director of Administration on a case by case basis."⁴

Fraternization is defined as:

Employee association with offenders, or their family members, outside of employee job functions, that extends to unacceptable, unprofessional, and prohibited behavior; examples include non-work related visits between offenders and employees, non-work related relationships with family members of offenders, discussing employee personal matters (marriage,

¹ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

² Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(D)(2).

children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.⁵

Black's Law Dictionary (6th edition) defines "associate", in part, "Signifies confederacy or union for a particular purpose, good or ill." Webster's New Universal Unabridged Dictionary defines "associate", in part:

2. to join as a companion, partner, or ally: *to associate oneself with a clause.* *** 5. To keep company, as a friend, companion, or ally: *He was accused of associating with known criminals.* 6. to join together as partners or colleagues. *** 8. a companion or comrade: *my most intimate associates.* 9. a confederate; an accomplice or ally: criminal associates.

Non-professional associations include extending special privileges to inmates. DOC Operating Procedure 135.2 governs Rule of Conduct Governing Employees Relationships with Offenders and provides:

Special Privileges – Employees shall not extend or promise an offender special privileges or favors not available to all persons similarly supervised, except as provided for through official DOC channels.

Grievant afforded Inmate E the special privilege of serving as a basketball referee. Inmate E was able to enter a part of the Facility he otherwise could not enter. He was able to speak to inmates he otherwise could not have visited. By affording Inmate E a special privilege, Grievant had a non-professional association with Inmate E which constituted fraternization under the Agency's policy. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant is upheld.

Grievant argued that she did not fraternize with Inmate E. She argued that she was carrying on the practice of Mr. W by allowing Inmate E to serve as a referee. The evidence, however, showed that Mr. W stopped using Inmate E as a referee and had other inmates who were working in the gym and serving as referees. By letting Inmate E serve as a referee, Grievant was affording him a special privilege not available to other inmates.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management"⁶ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

⁵ Virginia Department of Corrections Operating Procedure 135.2, Rules of Conduct Governing Employees' Relationships with Offenders.

⁶ Va. Code § 2.2-3005.

officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction

in which the grievance arose within **30 days** of the date when the decision becomes final.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.